FILE COPY

Office - Supreme Court, U. S.
FILED
SEP 21 1946
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 51.

FERDINAND FISWICK, JACOB F. MAYER, and FRITZ GUSTAV RUDOLPH,

vs.

THE UNITED STATES OF AMERICA.

BRIEF ON BEHALF OF PETITIONERS.

FREDERIC M. P. PEARSE,
Attorney for and of Counsel with Petitioners.
744 Broad Street,
Newark 2, New Jersey.

Arthur W. Cross, Inc., Law Printers, 71-73 Clinton Street, Newark 5, N. J.

INDEX

	PAGE
OPINION BELOW	1
JURISDICTION	1
SPECIFICATIONS OF ASSIGNED ERRORS AND QUESTIONS PRESENTED THEREBY	2
THE STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF PROCEEDINGS	4
THE INDICTMENT	6
STATEMENT OF FACTS	8
ARGUMENT	21
Point I. The Government failed to prove the charge of conspiracy, as set forth in the indictment	21
Point II. The Trial Court erred in its various rulings on the probative force and effect of statements made by and conversations held with defendants after the alleged conspiracy had ended, and the Circuit Court of Appeals likewise erred in sustaining the rulings of the Trial Court	26
Point III. There was no proof of intentional falsification in the registration statements filed by defendants	39
Point IV. The Trial Court erred in charging the jury on the admissibility and probative force of the written statements and verbal admissions of the defendants and the Circuit Court of Appeals erred in upholding this charge	43
Point V. The Trial Court erred in refusing to charge the jury as requested by the defendants and the Circuit Court of Appeals erred in upholding the Trial Court in this respect	49
CONCLUSION	51

Cases Cited.

	PAGE
Bridges case, 326 U. S. 135, 84 L. Ed. 2	41
Brown v. *Ellicott*, 225 U. S. 392, 56 L. Ed. 1136	28
Fowler v. *United States*, 273 Fed. 15	21
Pettibone v. *United States*, 148 U. S. 197, 34 L. Ed. 419	21
State v *Herbert*, 92 N. J. L. 341, 105 Atl. 796	34
United States v. *Ansmeir*, 152 Fed. (2d) 349	25
United States v. *Kissel*, 218 U. S. 601, 54 L. Ed. 1168	21, 28
United States v. *Marino*, 91 Fed. (2d) 691	21
United States v. *Reimer*, 79 Fed. (2d) 315	41
United States v. *Socony Vacuum Oil Company*, 310 U. S. 150, 84 L. Ed. 1129	28

Federal Statutes.

Judicial Code, Section 240 (A), as amended by Act of February 13, 1925, C. 299, 43 Stat. 938 (28 U. S. C. 347)	1
Title 8 U. S. C. A. Section 452(a)	3
Section 453(a)	3, 7
Section 453(b)	3, 7, 23
Section 455(a)	3
Section 457(c)	4, 28
Section 137(c)	41
Title 18 U. S. C. A. Section 88	4, 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 51.

FERDINAND FISWICK, JACOB F. MAYER, and
FRITZ GUSTAV RUDOLPH;

vs.

THE UNITED STATES OF AMERICA.

BRIEF ON BEHALF OF PETITIONERS.

Opinion Below.

The opinion of the Circuit Court of Appeals of the Third Circuit, including the dissenting opinion (Record, p. 290) is reported in 153 Fed. 2d, 176.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered December 10, 1945. A petition for rehearing was filed and denied by the Circuit Court of Appeals for the Third Circuit on January 26, 1945. The petition for certiorari was filed March 4, 1946 and the writ granted April 22, 1946 (Record, p. 319). Petitioners invoked the jurisdiction of this Court under Section 240 (A) of the Judicial Code, as amended by the Act of February 13, 1925, c. 299, 43 Stat. 938 (28 U. S. C. 347).

Specification of Assigned Errors and Questions Presented Thereby.

1. Did the trial court err in holding that proof of the conspiracy charged in the indictment was sufficient *prima facie* to leave the issue to the jury and the Circuit Court of Appeals in sustaining the trial court in this determination.

This question is presented by the errors specified in assignment of errors numbers 2, 3 and 4 (Record, p. 284).

2. Did the trial court err in its various rulings on the probative force and effect of various statements by defendants (described as confessions and admissions) and the Circuit Court of Appeals in sustaining the rulings of the trial court.

This question is presented by the errors specified in assignment of errors numbers 8, 9, 10 and 11 (Record, p. 288).

3. Was there any proof of intentional falsification by defendants in registration statements filed by them as aliens under the Act of 1940.

This question is presented by the errors specified in assignment of errors numbers 3, 4 and 11 (Record, p. 284).

4. Did the trial court err in its charge to the jury and refusal to charge as requested by defendants and did the Circuit Court of Appeals err in sustaining the trial court.

This question is presented by the errors specified in assignment of errors numbers 5 and 6 (Record, pp. 284 and 285).

The Statutory Provisions Involved.

Title 8 U. S. C. A. Section 452 (a) (in effect June 28, 1940):

> "It shall be the duty of every alien now or hereafter in the United States, who (1) is fourteen years of age or older, (2) has not been registered and fingerprinted under section 451 of this title, and (3) remains in the United States for thirty days or longer, to apply for registration and to be fingerprinted before the expiration of such thirty days."

Title 8 U. S. C. A. Section 453 (a):

> "The application for the registration and fingerprinting, or for the registration of any alien who is in the United States on the effective date of such section may be made at any time within four months after such date."

Title 8 U. S. C. A. Section 453 (b):

> "No foreign government official, or member of his family, shall be required to be registered or fingerprinted under this chapter."

Title 8 U. S. C. A. Section 455 (a):

> "The Commissioner is authorized and directed to prepare forms for the registration and fingerprinting of aliens under this chapter. Such forms shall contain inquiries with respect to (1) the date and place of entry of the alien into the United States; (2) activities in which he has been and intends to be engaged; (3) the length of time he expects to remain in the United States; (4) the criminal record, if any, of such alien; and (5) such additional matters as may be prescribed by the Commissioner, with the approval of the Attorney General."

Title 8 U. S. C. A. Section 457 (c):

> "Any alien or any parent or legal guardian of any alien, who files an application for registration containing statements known by him to be false, or who procures or attempts to procure registration of himself or another person through fraud, shall, upon conviction thereof, be fined not to exceed $1,000, or be imprisoned not more than six months, or both; and any alien so convicted within five years after entry into the United States shall, upon the warrant of the Attorney General, be taken into custody and be deported in the manner provided in sections 155 and 156 of this title."

Title 18 U. S. C. A. Section 88:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

Statement of Proceedings.

The three defendants, Ferdinand Fiswick, Jacob F. Mayer and Fritz Gustav Rudolph, who appeal, are among 31 defendants who were indicted in the District of New Jersey and three named co-conspirators (not named as defendants) and others unnamed and also not indicted, in an indictment charging a conspiracy to defraud the United States with respect to certain registration statements filed

under the Alien Registration Act of 1940 hereinbefore set forth. The indictment was severed as to 14 of the defendants named therein, 5 retracted and entered pleas of guilty before the trial started, and the trial was moved on November 27, 1944 as to 12 of the defendants. During the trial, one of the defendants retracted his plea and entered a plea of guilty. At the conclusion of the case, the indictment was dismissed as to one of the defendants on trial. The case as to the remaining 10 defendants, including the 3 who appeal, was submitted to the jury. The jury disagreed as to 4, found a verdict of not guilty as to 3 others and convicted Fiswick, Mayer and Rudolph. Fiswick was sentenced to serve eighteen months, Mayer a year and a day, and Rudolph eighteen months. Fiswick, has served his sentence at the Federal Penitentiary at Danbury, Connecticut, and Mayer and Rudolph are released on bail. While Fiswick has served the sentence imposed if his conviction is sustained he is like Mayer and Rudolph still subject to deportation if this conviction is on grounds involving moral terpitude.

Before issue was joined, motions were made to quash the indictment and were denied. At the end of the government's case and at the end of the entire case motions were made for a directed verdict of not guilty and were denied.

Before the Court charged the jury various requests to charge were made by the defendants. Many of them were charged by the Court but some of them which related to the particular issues involved in the charge in the indictment and in the proofs were denied. Various exhibits were also admitted in evidence over timely objections to such admission.

The Indictment.

The indictment (Record, p. 7) charges that the defendants, between the first day of September 1939 and the day of the filing of the indictment at the April Term, 1944, of the United States District Court for the District of New Jersey, conspired with one Draeger, who was a consular officer of the German Reich in New York, Hans Vogel, his clerk or secretary, and one Fritz Zeglin, whose identity is not clear, and the German Ambassador to the United States and members of his staff, and other representatives of the Third German Reich, to defraud the United States of its governmental function in securing the full and complete listing of aliens residing in the United States together with certain information concerning them, particularly "membership in and affiliation with any clubs, societies, and organizations devoted to furthering the political activities, public relations and public policy" of a foreign government, and participation in the meetings and activities of such clubs, societies and organzations.

The indictment further charges that in the summer of 1941 and for five years prior thereto, Draeger was not only the German Consul in the City of New York, but also Kreisleiter or leader of the overseas portion of the Nazi Party in the United States, and that Vogel was his secretary and that in such capacity Vogel was engaged in matters concerning and affecting the operation and conduct of the Nazi Party and its members in activities in the United States (Record, p. 9).

The indictment then devotes several paragraphs to the alleged activities of the Nazi Party in the United States and its aims and purposes which generally were to pro-

mote loyalty and obedience to Adolph Hitler and the Nazi Party and the German Government.

The indictment then charges that it was part of the conspiracy that the defendants, being German nationals, immediately preceding the fall and winter of 1940 and well knowing the provisions of the Alien Registration Act of 1940 (Title 8 U. S. C. A. Section 453, *et seq.*) would in such registration "deny, falsify, conceal, misrepresent, mislead, disguise, deceive, fail to mention, equivocate and cover up by trick, scheme and device, material facts relating to the existence, kind and extent of each defendant's membership in, connection and affiliation with, their activities in and the activities of the said Nazi Party within the United States, during the five year period immediately preceding such registration" so that the officials of the United States would be defeated in their effort to obtain complete information required in the registration, the same being for the purpose of ascertaining the identity, location and activities of all aliens residing in the United States.

The indictment then goes on to charge that it was part of the conspiracy that the Consul, his secretary and the German Ambassador, etc. would advise, counsel, instruct, command and direct the defendants and that they would accept such advice and counsel and follow such instructions and commands to falsify, as above charged, in the registration certificates filed by each.

The indictment then charges that it was part of the conspiracy that they would continue to so deny and falsify after the Fall and early Winter of 1940 and that they, the defendants, would come before the Alien Registration officers and omit to disclose their membership and affiliation with the Nazi Party.

Then follow forty alleged overt acts. The defendant Mayer is mentioned in overt acts 17 and 18. The defendant Fiswick is mentioned in overt acts 25 and 26. The defendant Rudolph is mentioned in overt acts 32 and 33. The foregoing acts as to each of the defendants relate to a visit by each to the German Consul's office and the subsequent filing of the registration statement of each. The date of the last overt act alleged in the indictment was (overt acts 24 and 28) on or about December 26, 1940.

Statement of Facts.

For all practical purposes the Government relied upon the testimony of one Lilly Illian and certain papers which she identified, to support the charge of conspiracy set forth in the indictment.

Miss Illian was a clerk in the German Consulate in New York from March 1939 until May 1941 (Record, p. 17). She was in the department of the consulate headed by Dr. Draeger, who is named as a co-conspirator, and was actually in a Mr. Vogel's office, another co-conspirator, who was Draeger's secretary (Record, p. 18). One of her tasks was to receive dues from the members of the Nazi Party and to take care of correspondence that was dictated which pertained to the Party (Record, p. 18). Vogel did most of the dictating. Dr. Draeger seldom dictated. The witness did not know what the exact work of Dr. Draeger was but knew him as Consul and "Kreisleiter" (which she translated as district leader) of the National Socialist Party in New York. She collected dues and put them in a cash box and they were subsequently deposited in the bank in one of the accounts of the Consulate (Record, p. 22).

Anyone who paid dues was either given a stamp or a receipt and each member had neither a membership card or a book. Vogel took the applications for membership and they were sent to Germany with a report by Dr. Draeger (Record, p. 22). Each applicant had to have two sponsors in the United States and two sponsors in Germany (Record, p. 23). The witness testified (Record, p. 24) that when she started to work in the office there were file cards and files or folders. These cards contained the name of the person, the date of his birth, his occupation, his address and apparently a record of the payment of dues (Record, p. 24). She testified that the total amount of the initiation fees, etc. was $15.50 (Record, p. 24). Those who became members of the party had either cards or books which were sent from Germany (Record, p. 25). However, those who applied for membership also received a card (Exhibit G-2, Record, p. 26). And G-3 was sent to Germany with a report from Dr. Draeger (Record, p. 27). The witness testified that the applicants for membership also signed other papers such as G-4, G-5 and G-6 which stated whether or not applicant belonged to the Rotary Club or the German-American Bund, etc. When a German national applied for membership, he started paying dues but it took about two years to get the approval of his membership from Germany. If he was accepted as a member, he then received either a membership card or a book (G-10). (G-11 and G-12 are forms of receipts for dues) (Record, pp. 32, 33).

The Government produced an exhibit marked G-17 (Record, p. 36) which contained a list of names under the heading "List of Persons who have applied for Passports" (Record, p. 37). Miss Illian testified that she made part of this list up from the file cards hereinbefore referred to "of

members and prospective members" (Record, p. 37), and the rest of the list was made up by a Miss Koch, who worked in Mr. Vogel's office with her. She characterizes through her testimony persons who applied for membership in the party as "prospective members" (Record, p. 39). This list, she says, made up from the file cards, was a list of not only full members of the Party but also those who had applied for membership. According to her account the card index from which the list was made by her and Miss Koch disappeared from the office. She thinks it was destroyed by Mr. Vogel but she does not know positively. Anyway, it was in the early part of *1940* (Record, p. 40). While she does not know how the cards were destroyed, she testified that Vogel told her that the files in the office were burned (Record, p. 41), and her recollection is that the list (G-17) was made up in the early part of 1940.

She also used this list in sending out invitations or notices of various festivities in and about New York sponsored by the Consul's office, and numerous exhibits starting with G-18 showing the character of these notices or invitations were offered in evidence and had to do with dances, concerts, motion pictures, lectures and like entertainments which were open not only to the members of the Party but to the outside public (Record, p. 43). *She did not nor could not identify any of the defendants on trial as being the persons whose names were on the list.* In fact she did not know or identify any of the defendants on trial when she was called upon from time to time to identify them.

In August or September 1940, after the Registration Act was passed, Miss Illian testified that under the direction of Vogel she sent out form letters of which Exhibit G-36 is a sample (Record, p. 46) to the persons whose names were on

the list (G-17), and that some unidentified persons came in response to the letter (Record, p. 47), and that Dr. Draeger or Mr. Vogel instructed them. At this point in her testimony (Record, p. 48) the United States Attorney made a representation that he was going to prove that some of the defendants came, and after further argument the United States Attorney said this:

> "I don't know whether any of these defendants were there at this particular time but I will show a course of conduct by admissions made by those defendants themselves that they appeared at the Consulate office in response to letters received."

He did not undertake to prove that she either saw them when they came or heard what was said (Record, p. 48). She was then shown an exhibit which was marked G-37, which purports to contain the statement that the persons who called at the office in response to certain letters, were to make to items 10 and 15 on the Alien Registration Statement to be filed by all aliens (see Exhibit G-37) and that this had been prepared by Mr. Vogel, and that she was told by Mr. Vogel to give this to the people who called, and she *thinks* she did hand out some of the slips (Record, p. 50). Some people had registered before they received these instructions as to how to register and she made a list of them (Record, p. 50). The first instructions were not in writing but they were given by Dr. Draeger and the Court permitted her to testify, over objection, that Draeger "instructed the members and prospective members not to put the fact in that they were members of the National Socialist Party" in the Registration "Questionnaire" (Record, p. 51).

The second set of instructions (G-37) came after some had registered and were to be sent because "these people were to get a letter that was sent to the State Department and amending letter—I think they said something about it this morning." She then says in answer to a question:

> "The Court: They were to get a letter?
> The Witness: Yes.
> The Court: Which they in turn were to send to the State Department?
> The Witness: Yes.
> The Court: And the letter was to be sent out by whom, sent out from the Consulate?
> The Witness: Yes, it was given to the person I think.
> The Court: Given to them?
> The Witness: I would never send it out I know; it was somehow given to this person and he sent it out to the State Department."

The amendment to the Registration Statement was to the effect that they, the registrants "were non-resident members and so on" (Record, p. 53). She thinks she got the list of names of the persons to whom she was to send the second letter from Mr. Vogel. They were "told to me", and G-39 is the letter that she refers to, amending the original alien form (Record, p. 53). There was no proof whatsoever that any of these came into the hands of the defendants.

While on direct examination Miss Illian made use of the expression "prospective member", the "prospective" member was nothing more than an applicant for membership and did not become a member until final word came from Germany that he had been admitted to membership in the Party (Record, p. 63), although he did pay dues while

his application was pending (Record, p. 64). The card index that she spoke of which she said was destroyed, and from which she made out the list of names on G-17, contained not only the names of members but also those who had applied for membership. The Consul's office was closed in May 1941. On cross examination she only *thought* that she made up the list in 1940. She did not know the exact date. All she really knew was that Mr. Vogel told her that the file cards were going to be destroyed (Record, p. 41). G-36 was a copy of the letter that was sent out first from the office to the German nationals who were called upon to register (Record, p. 46).

On direct examination she was asked the question (Record, p. 47) "Miss Illian, do you know whether any of the members came to the German Consulate after that form letter which is Exhibit G-36 for Identification was sent out?" She said "Yes". And when asked if they came in response to that she said "Some of them, yes". However G-36 reads as follows (English translation): "I hereby request you to look me up at the Consulate General as soon as possible for the purpose of discussing a personal matter.

Heil Hitler
/s/ Dr. F. Draeger
Consul

Re. Summons re first reminder;

In arrears since July
$5 July 40
Dec. 40 inclus.
April 1941 incl."

This is but a sample of the kind of proof that was offered in this case by the Government.

On cross examination (Record, p. 69) Miss Illian said she kept no list of those whom, she said, came in response to the letter that was sent and no defendant was identified by her as being on this list. Only in one instance was she told what to say to people who came in but when asked whether she gave any of the people advice as to how to fill out the Alien Registration Statement, her only recollection was "I might have, yes". And when asked by the Court if she gave any of the people the form that had been made out by Vogel her answer was "Yes, I might have given it, yes." When pressed by the Court her answer was "I think I did". The form which was given out to some who came, according to her, is the form which appears on G-39, which reads as follows:

"United States Department of Justice
Immigration and Naturalization Service
Alien Registration Division
Washington, D. C.

Sirs:

Registration No.....

I have previously registered as an alien under the above number on the form provided for that purpose. I assumed from the wording of questions No. 10 and 15, that these questions referred to present activities.

However, in order to avoid any misunderstanding I wish to amend my registration so that the same shall show that I am a non-resident member of the National Socialistic German Labor Party since.... ....., but have not been actively engaged in any

way in said party, or on its behalf, and am not engaged in political activities in this country.

Respectfully submitted,"

As will be seen later, only one of the defendants wrote any such letter, or knew anything about it. And the only quarrel with the letter is that the government insisted but did not prove, that there is no such thing as a non-resident member.

Over objection of counsel, the Court permitted the introduction of statements made by the various defendants on trial to the F. B. I. which statements were secured in the years 1943 and 1944, and permitted their use as proof of the *corpus delicti* and the continuing character of the alleged conspiracy. This will be more fully discussed *infra*.

In addition to the written statement of the defendant Mayer, Mr. Bell of the F. B. I. was permitted to testify, over objection, to conversations which he had with Mayer about the time the statement was made. It appears from Mayer's statement (G-35 on Record, p. 272) that in 1936 or 1937 someone asked him if he would like to join the National Socialist German Labor Party and he was taken to New York to the German Consulate and there talked to someone and made application for membership and received a card. From time to time he went to the Consulate to pay dues, the last time being in December 1940. He also went to the Consulate in *September 1939* at the call of Dr. Draeger, the Consul, at which time twenty or twenty-five other persons were present and they were also told that they could become a citizen of the United States and remain in the Party. Some of those who were there, outside of Mayer, stated that they wanted to return to Germany.

In December 1940, Mayer went to the Consulate to pay his dues, at which time Vogel took the card away from him and wrote out *answers* to what are erroneously called *questions* on the Alien Registration statement (G-1G, Record, p. 267). As to number 10 he was to write "Reichsdeutsche vereinigung, New York, N. Y." As to number 15 he was to say "have not". He said he never heard of the above organization and was never a member of it. He says he was also told to leave out that he was a member of the National Socialist German Workers Party. There is no evidence that he ever did any more than make application to become a member. There is no proof that he visited the Consulate in the fall and winter of 1940 at anybody's suggestion or in response to any letter.

Statements of the defendant Rudolph were also admitted in evidence under like circumstances. One statement was made in November 1943 (G-67, Record, p. 279) and the other on September 5, 1944 (G-67, Record, p. 281). Appparently this defendant made application for membership in 1938 to join the National Socialist German Workers Party and received a book which he subsequently destroyed when he found that his mother and brother had died in Germany. While he says in the statement that he continued to pay dues up to a month or so before Pearl Harbor, there is obviously an error because the German Consulate was closed in May, 1941. In another paragraph in his statement, the following words are put in his mouth: "At the time of the first Alien registration in 1940, I was advised and consulted (*sic*) by the official at the German Consulate in New York, N. Y., to state on my registration form that I was not a member of this National Socialist

German Worker's Party. They stated that if anything happened to just deny membership in the party. They gave no further explanation that I recall." He does not recall the person who gave him the advice at the Consul's office.

However, on September 5, 1944 (Exhibit G-67-A, Record, p. 281) another statement is made by Rudolph after being interrogated by the F. B. I. In this second statement he states the following:

> "I first want it understood that I filled out both the 1940 and 1942 Alien Registration forms myself. I received no aid in executing them. Anything I may have previously stated in connection with having been advised and assisted in filling them out is not correct. I must have been excited at the time I told anything to the contrary."

He reiterated this later on by saying:

> "I wish to again state that I did this all of my own volition without anyone telling me how or why I should do so."

This, of course, refers to the statement made by him with respect to items 10 and 15 of the Registration Statement. The Registration Statement of 1942 being the Alien Enemy Registration Statement is not involved in these proceedings.

So far as the defendant Fiswick is concerned, his written statements were admitted in the same way (G-65, Record, p. 273). He states in detail, in his statement of April 29th, 1944, that he did make application for membership in the National Socialist German Worker's Party in July or August of 1939 in the presence of Vogel. From this state-

ment that he made in April 1944, it would seem that he went to the German Consulate to make an application to become a member of the Nazi Party because he had Nazi views, and for no other reason. However, in his subsequent letter in May 1944, the real reason appears why he made application for membership in the Nazi Party but never went through with it, and was not a Nazi at heart. Quite the opposite, as he is a devout Roman Catholic (Record, p. 279). He also stated in his first statement that he received some kind of a notice requesting him to appear at the German Consulate in 1940 and that he went there and discussed the Alien Registration statement with Vogel, who told not only Fiswick but also four other applicants for membership in the Party "that it would not be necessary for us to put down in the Alien Registration form of 1940 that we were members of the National Socialist German Workers Party since we had not as yet received our membership books from Germany." And so Fiswick says he did not put down in his Alien Registration form that he was either a member of or affiliated with the Party. Then follow words that were obviously put into his mouth: "I followed the instructions of Hans Vogel in filling out this alien registration of 1940." In his first statement he also speaks of attending a "meeting" of the Party at the German Consulate in April or May 1941. There is no proof in the case that any meetings of the Nazi Party of either a formal or informal nature were ever held at the Consulate. As Miss Illian says, from time to time letters were sent out requesting a few people named in the list to come to the Consulate on a personal matter, and the words used by Fiswick in his statement "In April or May 1941 I attended a meeting of the National Socialist German Workers Party"

were ill advised and Fiswick obviously did not mean what such words would imply. Also the words "I destroyed my prospective membership card * * *" after attending this final "meeting" of the National Socialist German Workers Party." To repeat, there is absolutely no proof outside of this statement of his made in April 1944 that he or any of the other defendants ever attended or that a meeting of the Party was ever held at the German Consulate. He was simply there with others and Draeger told them something and that is all there was to it.

Fiswick's real reason for application for membership in the Party appears in his letter of May 19, 1944, to the United States Attorney. He had some idea in 1939, on account of his wife's health, of returning to Germany permanently, and had an opportunity to purchase a business there and had corresponded with his brother, who was not a member of the Party and who, like Fiswick, when he lived in Germany, were members of the Catholic Center party until it was suppressed by Hitler. Before it became time to file his registration statement he had given up the idea and as he never had anything to do with the Party one way or the other and was not a member of it, he truthfully made the statements which he did make in his Registration Statement.

From none of these statements and the statements of other defendants that were admitted in evidence which were all of like import, or from the testimony of the F. B. I. agents who were permitted to testify as to conversations which they had with various defendants on trial when they interviewed them in 1943 and 1944, can it be said that there was proof that the conspiracy alleged in the indictment ex-

isted, and without these statements the government's case is even more barren of proof.

Fiswick and Rudolph in their Registration Statements, when called upon to declare under Item 10 "I am, or have been within the past 5 years, or intend to be engaged in the following activities: (In addition to other information, list memberships or activities in clubs, organizations, or societies)" stated "None". Mayer stated "Reichsdeutsche Vereingung New York, N. Y."

All three of them in Item 15 stated "Have not". Item 15 reads:

> "Within the past 5 years I.....been
> have, have not
> affiliated with or active in (a member of, official of, worker for) organizations, devoted in whole or in part to influencing or furthering the political activities, public relations, or public policy of a foreign government * * *" (Exhibit G-1-F).

In some of the registration statements of the other defendants on trial they stated with respect to this Item 15 "I have not". Others stated simply "I have". Others stated "I am a non-resident member of the National Socialist German Labor Party". Another and the only one we could find, wrote the supplemental letter similar to G-39 *supra*, as to non-resident membership.

The Registration Statements were made by these various defendants at United States Post Offices and the blanks were filled in by clerks selected by the Government to assist registrants (Record, pp. 266, 268, 270).

Later we will discuss other parts of the evidence in connection with our argument and thus avoid repetition.

ARGUMENT.

POINT I.

The Government failed to prove the charge of conspiracy, as set forth in the indictment.

(Assignment of Errors, 2 3 and 4.)

There is an utter failure of proof of any conspiracy. As has often been said, "A conspiracy is a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose". *Pettibone* v. *United States*, 148 U. S. 197, 34 L. Ed. 419; *United States* v. *Marino*, 91 Fed. (2d) 691, and cases cited. "It is a partnership in criminal purposes. The gist of the crime is the confederation or combination of minds," and while a conspiracy is constituted by an agreement it is however the result of the agreement and not the agreement itself. *United States* v. *Kissel, supra*, 218 U. S. 601 at 608, 54 Law Ed. 1168; *United States* v. *Marino, supra*. There must be a concert of action, all the parties working together understandingly, with a single design for the accomplishment of a *common* purpose. *Fowler* v. *United States*, 273 Fed. 15 at page 19. The accused must join in the agreement to be guilty of a violation of the statute, for even if he commits an overt act, he does not violate the statute unless he joins in the agreement. *United States* v. *Marino, supra*, at page 695 and cases cited. These are all well known rules and hardly need recitation.

We repeat that the proofs in this case fail to establish the elements necessary to constitute a conspiracy under the provisions of Title 18 U. S. C. A., Sec. 88. While it may

be *alleged* and *said* that those named in the indictment as defendants and co-conspirators had a concert of purpose, that is to defraud the United States by each defendant filing a false statement, there is no proof of any concert of purpose between Draeger and Vogel on the one hand and the defendants on the other, nor was there proof of the existence of any agreement between Draeger and Vogel and one in which the defendants joined.

From the testimony of Miss Illian it appears as we have heretofore shown that the relation of master and servant existed between Draeger and Vogel and Vogel simply carried out instructions given to him by Draeger. The same with Miss Illian, who is not even named as a co-conspirator, nor is Miss Koch, the other clerk in the office. There was no proof outside of statements made by some of the defendants who were on trial to the F.B.I. in 1943 or 1944, that they visited the German Consulate in New York in response to a written request to call there. Those who called voluntarily, obviously called for the purpose of getting information as to how the Registration Statement should be filled out. Use the verbs "directed", "instructed", or "suggested", if you please. These words do not import or establish by circumstantial evidence an agreement between those who came there and Draeger and Vogel or either of them. Assume that each defendant when he filed his Registration Statement intended to withhold from the Government of the United States the fact that he had ever been a member of, an applicant for membership in or affiliated with the Nazi Party, and that each one of them had such purpose in mind. It is not a conspiracy. Just what purpose Draeger the German Vice Consul may

have had in mind when he gave the instructions to Vogel (if he ever gave them) or what Vogel may have had in mind when he either instructed or advised those who came to the office, no one knows and there is no proof. And certainly if there was no unlawful agreement between Draeger and Vogel then none of the defendants took part in any conspiracy. Of course it is true that a conspiracy can be proven by circumstantial evidence, but such evidence is utterly lacking in this case. We contend further that as Draeger and Vogel, or Draeger at least, were consular agents and not called upon to register, that they could not enter into the agreement with the other defendants that all of them should register falsely. (See Statute on exemption of government agents *infra* Title 8 U. S. C. A. Sec. 453 (b).). The necessary concert of purpose is lacking here the same as it is lacking between one who sells a commodity and one who purchases that commodity from him.

Neither is following instructions or advice to do a certain act proof of an agreement to do it any more than a child obeying its parents or a patient taking the advice of a physician.

If there had been proof that all the defendants or some of them came to the Consulate seeking advice as to how to *conceal* the fact in their Registration Statements that they were members of the Nazi Party then we might be confronted with a different proposition. *But that is not the proof.* There is no proof that they went there with any such purpose in mind.

It will be recalled that Miss Illian testified that Draeger had directed that a letter be sent out to prospective registrants requesting them to call at the Consulate (Record,

p. 45). This was about the time the Registration Act went into effect. Some people came in and received instructions, people who were not identified. Later on those who had registered were sent for again and told to correct the statement made in item 15 so that it would read that he was a non-resident member of the Nazi Party.

We have not printed in the record the statements of the other defendants on trial that were admitted in evidence over our objection as they were all to the same general effect as the statements of the defendants whose appeal is now being considered (Record, pp. 272-282).

The only other witness, in addition to Miss Illian who testified with respect to "instructions", was the defendant Borchers, who was called to testify by the Government (Record, pp. 87-102). The only thing of importance that he said was that in the early part of September 1940 he was called to the German Consul's office and saw Vogel and Draeger and he was told that he would soon have to register and that was *all* he was told. He said that later on he went to the Consul's office but had no talk about registering. He was then asked the question, referring back to the incident in September, 1940 (Record, p. 93):

> "Q. What did he (Vogel) say in connection with registering about your Party membership? • • •
>
> The Interpreter: He said that when they went to register they were not to state that they were organized.
>
> Q. Organized as to what? A. The Nazi Party."

We submit that even taking the testimony of Miss Illian and Mr. Borchers at its face value together with the state-

ments made by the defendants there is an utter failure of proof of the conspiracy charged, or is there any proof of intentional falsification by the individual defendants in the Registration Statements filed by them, and that the motions to direct a verdict of not guilty should for these reasons have been granted.

As we read the majority opinion of the Circuit Court of Appeals (Record, p. 290) the Court reached the conclusion that the trial court committed no error in denying the motion to direct a verdict of acquittal and in leaving it to the jury to determine the existence or non existence of a conspiracy as charged in the indictment. In this we urge that not only did the trial court err but also the Circuit Court of Appeals in sustaining this ruling.

We also, under this Point, desire to urge that while the trial court and the majority of the Circuit Court of Appeals concluded that there was proof that the defendants conspired *to defraud the United States*, that the indictment really went no further than to charge that the defendants conspired to violate the Alien Registration Act by filing false statements. The minority opinion upholds this contention (Record, p. 365) and this view is further sustained by an opinion of the Circuit Court of Appeals of the 2nd Circuit where an indictment in similar language to the indictment in these proceedings was held to charge a conspiracy to commit the substantive offense of violating the Alien Registration Act and not of conspiring to defraud the United States (*U. S.* vs. *Ansmeir*, 152 Fed. 2d, 349).

POINT II.

The Trial Court erred in its various rulings on the probative force and effect of statements made by and conversations held with defendants after the alleged conspiracy had ended, and the Circuit Court of Appeals likewise erred in sustaining the rulings of the Trial Court.

(Assignment of Errors 8, 9, 10, 11.)

It is our contention that the trial court erred in permitting to stand, the testimony of agents of the Federal Bureau of Investigation concerning conversations with and the written statements made by some of the defendants years after the alleged conspiracy must have ended. It is also our contention that such statements were never admissible for the purpose of proving the *corpus delicti, i. e.* the alleged unlawful agreement, nor of the continuance of the alleged conspiracy.

The indictment charges (Record, p. 8) that the defendants and co-conspirators conspired to defraud the government of its governmental function in securing the full and complete listing and fingerprinting of all aliens residing and being within the United States together with their names and places of residence, nationality, date of entry into the United States, activities therein, criminal records and membership in and affiliation with any clubs, societies and organizations devoted to furthering the political activities, etc. of foreign governments by filing false Registration Statements. The basis of the authority of the United

States to have such information is found in the statutes hereinbefore set forth in "Statutes Involved". These statutes make it the duty of every alien to register before the end of the year 1940 and the registration is to be made on the forms prepared for the purpose. A sample of this form is Exhibit G-1-F (Record, p. 265). Punishment is prescribed for false statements in such registration. While the indictment, charging a conspiracy to defraud the United States in this respect, goes on to state that it was part and parcel of the conspiracy that each one of the defendants should file such false registration statement it is not alleged that in defrauding the United States anything else was to be done. So here we have a conspiracy charged, to defraud the Government by cert n aliens filing false registration statements, all of which statements were filed not later than December 1940. The last overt act alleged, took place in December 1940 and was the filing of a Registration Statement by one of the defendants. The Court admitted the testimony of the agents of the Federal Bureau of Investigation (Record, p. 106, *et seq.*) with respect to conversations with some of the defendants in the latter part of 1943 and in 1944, on the theory that evidence had to come in piecemeal (Record, p. 107) and on the theory that it was admissible because the indictment charged that the conspiracy alleged, continued down to the date of the filing of the indictment.

We submit that if it is contended that a conspiracy existed and was proven that it ended when the last Registration Statement was filed in December 1940. To hold otherwise would be to confuse the continuance of the result with the continuance of the crime. To keep a conspiracy alive

and continuing there must be proof of the continuous cooperation of the conspirators to keep it alive. *United States* v. *Kissel*, 218 U. S. 601 at 608, 54 L. Ed. 1169 at 1178; *United States* v. *Socony Vacuum Oil Company*, 310 U. S. 150 at 253, 84 L. Ed. 1129 at 1184; *Brown* v. *Ellicott*, 225 U. S. 392 at 400, 56 L. Ed. 1136 at 1140.

To hold that the conspiracy alleged continued down to the day of the filing of the indictment would be to uphold a theory that as long as the consequences or the effect of previous acts continued to endure by the same token the conspiracy itself continued. To hold that the conspiracy continued if any existed, after the filing of the last Registration Statements would be to hold that it continued to exist until the alleged false statements in the Registration Statements were corrected. To so hold would mean that an indictment might be found at any time after the Registration Statements were filed and until the falsity was discovered or disclosed, no matter how many years later that might be. Even then six more years could elapse before the statute barred prosecution, if such a theory is tenable.

Incidentally, it is perfectly obvious why these defendants were charged with conspiring to defraud the Government. The indictment was not found until the April Term, 1944 and at that time the statute of limitations had barred prosecution for the commission of the substantive offense, (Title 8 U. S. C. A. 457), as the three year limitation applies to that statute.

The trial judge admitted in evidence the statements of all the defendants against each other after the motion had been made to direct a verdict of not guilty at the end of the Government's case. The Court made the following statement (Record, p. 165):

"The Court: Now in order that there may be no mistake, a question has arisen which I conceive to be novel, as to whether or not there is a continuing conspiracy without a positive act; I am ruling that the conspiracy continued to the date of the return of the indictment, because I hold it a plot contemplating bringing to pass a continuing result which could not continue without the continuous cooperation of the conspirators to keep it up, and that there (p. 432) is such continuous cooperation. That has been the determination of the Supreme Court where there was an act of commission; I am now extending it to a situation whereby cooperation may be indicated by failure to do some act to indicate a desire to bring to an end the continuing situation effected by the act previously done. Under that ruling, and in order that there may be no further mistake, I shall rule that all statements which were made by each of the defendants, although they were made after 1940, will be admissible against each of the other alleged co-conspirators.

Now, that puts me in right up to my eyebrows, I cannot get out of it, if I am wrong and I want the question determined.

Mr. Pearse: Judge, you mean it puts us right up to our eyebrows.

The Court: No, it puts me in; I mean there is no mistake about what I am trying to say, is there, Mr. Pearse?

Mr. Pearse: Not the slightest. Your Honor will allow us all an exception?"

A discussion of the principles of law with respect to the admission of statements of co-defendants first arose at the trial when the Government called Mr. Bell of the Federal Bureau of Investigation to testify with respect to conver-

sations that he had had with the defendant Mayer in November 1943, ~~two~~ three years after the time for filing the Alien Registration Statement required under the Act of 1940. This was prior to the ruling by the Court which was just quoted.

Counsel objected (Record, p. 106) on behalf of the defendants other than Mayer, to such testimony, not only on the ground that it was not binding on the other defendants but that it was not binding *then* even upon Mayer, for the reason that there had not yet been introduced sufficient proof of the existence of any conspiracy. The Court however, let the testimony in at that time with the reservation of the right to strike it out and not passing definitely at that time on the proofs so far as the conspiracy was concerned, making the following comment (Record, p. 107):

> "The Court: But the proof is not all in yet, and there is no proof that the conspiracy was even entered into.
>
> Mr. Pearse: And if the Court please——
>
> The Court: Or there may not be—I am not passing on that definitely, but there may not be; * * *."

And the Court made a further comment (Record, p. 108) with respect to the proof of the existence of a conspiracy when it was called to the court's attention that the last overt act pleaded, was in December, 1940:

> "The Court: December of 1940, but that as I conceive it, does not prevent the Government from showing that there were other overt acts not recited or set forth in the indictment."

The Court then instructed the jury (Record, p. 110) as follows and before making the ruling first quoted in this Point:

> "The Court: I will say, ladies and gentlemen of the jury, that I have no means of knowing what this testimony will be, nor have you; but if it be in the nature of an admission on the part of the person with whom this witness is alleged to have spoken, it will be admissible at this time only as against this defendant who is supposed to have had the conversation; and if the conversation took place after the expiration of the conspiracy, it will be admissible against him and can under no circumstances be used against the balance of the alleged conspirators. All right, proceed."

Further objection was then made to the introduction of this testimony not only as against the others but also as against Mayer on the ground that the testimony was taken after Mayer was in custody and could not under any circumstances be used to prove the *corpus delicti* (Record, p. 111). Argument proceeded on that motion and thereupon the Court apparently decided to hold that there was already sufficient evidence from which the jury could find that a conspiracy existed (Record, p. 112), that is that the *corpus delicti* had been sufficiently proven. However, the Court did not then pass upon the proposition as to whether or not there was any evidence of the actual participation of any particular defendant in the conspiracy. Later on the question arose and it resulted in admitting in evidence the written statement of the defendant Mayer (G-56, Record, p. 146). Subsequently the testimony of other representatives of the F. B. I. was admitted with respect to some of the

other defendants as well as the written statements of all who were on trial and thereafter the motion was made that is referred to at the beginning of this point and was finally decided against the defendants in the language of the Court first above set forth.

No one can quarrel with a ruling that after a conspiracy has been proven *prima facie*, or rather after the introduction of proof of an alleged conspiracy of sufficient weight for the Court to determine that it had become a question of fact for the jury to decide whether or not a conspiracy existed as charged in the indictment, that the statements of individual defendants, after the termination of the conspiracy, may be used against the particular defendant who made the statement, with the qualifying instruction to the jury that under no circumstances can such a statement ever be used against co-defendants. However, in this case, the Court went much further and held that there was proof that a conspiracy existed and continued down to the time of the filing of the indictment and that statements taken just before or after the defendants were in custody and could not possibly commit any overt acts in furtherance of the conspiracy, whether in custody or not, were binding not only upon them but also upon all the other defendants and could be considered by the jury, taking all the statements together, not only as proof of the existence of but as the proof of the continuation of the conspiracy down to the day of the filing of the indictment.

We submit that there are no authorities to support any such ruling.

In the first place, from a reading of the statements, not only of the defendants who appeal, but also of the rest of

the defendants who were on trial, we challenge the Government as a matter of fact to point out where any of them furnish justifiable proof of the existence of a conspiracy, taking them singly or as a whole.

Again, it is only because the Court held that the conspiracy was a continuing one after December, 1940 that make such statements admissible even against the defendant or defendants who made them in the absence of other proof of the conspiracy charged. Certainly, the statements themselves are not overt acts, nor are there any admissions in them of overt acts by the defendants making them, after December, 1940.

Again, statements taken under the circumstances in which these statements were taken may not be used for the purpose of proving the *corpus delicti*. But if they are admitted in evidence they are highly prejudicial to the rights of the defendants who did not make them and who can not be bound by them. Furthermore, under the ruling made by the Court, who can say that the jury did not consider them in its search for proof of the existence of the conspiracy charged.

And again, we submit that the Trial Court in making its ruling has, as we have previously stated, confused the continuation of the results of the alleged unlawful agreement with the continuation of the alleged unlawful agreement itself.

In a charge of conspiracy to defraud the United States, it must be to defraud by doing something, either to deprive the United States of money or something of value, or by some definite step to interfere with governmental func-

tions. Here the charge was to conspire to defraud by filing false Registration Statements. After these were filed the object was accomplished. Not attempting to correct the alleged falsity is not a continuance of the unlawful agreement. Some act must be done to keep it alive. Such act was never proven. As further proof that the charge was limited to the functions of government established by the Registration Act of 1940, is the fact that under the Presidential Proclamation of *1942* all nationals of countries with which the United States was at war were required once more to Register and to file statements similar to those filed by *all* aliens in 1940 and there is no allegation in the indictment relating to this subsequent duty of the defendants or a charge of falsifying their status in the 1942 Registration Statements or proof that they did.

One of the best opinions on the subject of a continuing conspiracy is to be found in the case of *State v. Herbert,* 92 N. J. L 341, 105 Atl. 796. The opinion is by Justice Kalisch now deceased, but in his lifetime a very learned member of the New Jersey Supreme Court. The case, which was up for review, was based upon a charge of conspiracy to obstruct justice in a divorce suit, that is, to obtain a divorce on false testimony. One of the questions arose as to when the conspiracy ended and it arose over the admissibility of statements of alleged co-conspirators in the absence of each other after the false testimony had been given in the divorce suit, the case having been appealed from the Court of Chancery to the Court of Errors and Appeals, where it was pending, and during which period the statements admitted in evidence were made. After a careful review of the law as pronounced in the

Kissel case, *supra,* and in other United States Supreme Court cases, as well as in English cases, the Court reached the conclusion which it expressed as follows:

> "It would seem, therefore, in the present case that when the false evidence was produced and offered, in the Court of Chancery, the crime charged was complete, irrespective of the fact whether the divorce was granted or not. It is not to be overlooked that it is the nature of the agreement, not the act of the parties that determines whether the conspiracy is a continuing one.
>
> The averments in the indictment that the agreement was to pervert and obstruct the due administration of the laws of this State and to obstruct justice, do not have the legal effect of making the agreement a continuous one, for they are limited in their effect, by the language in the indictment, to the obtaining of the divorce by false evidence, and to falsely move and maintain the suit in the Court of Chancery. Instances of continuous conspiracies are those in restraint of trade, to extort money, and to divide the proceeds, and such acts which in their very nature carry with them *continuity of action.* (Italics ours.)
>
> The present case strikingly illustrates a condition that the United States Supreme Court warns against; that is, the likelihood of unconsciously converting the result of a conspiracy into a continuing one, as here, namely, the production of false evidence in the divorce case and the use subsequently made of such evidence by Mrs. Knittel and Garrison, on the appeal to the Court of last resort."

We submit that this is the very error into which the trial court in this case fell when permitting the admission in evidence of the statements of the various defendants made in 1943 and 1944 and ruling that they might be used

by the jury against all of the defendants. Admissions, if any, in these statements could never be used to prove the conspiracy or as proof of overt acts in its furtherance or continuance.

The Circuit Court of Appeals as appears in the majority opinion disagreed with our contentions on this point (Record, p. 361) while the dissenting opinion, in the main, sustained them (Record, p. 366).

The Circuit Court of Appeals held "that the scheme did not end with false registration. The latter was essential but to accomplish the end result the concealment of Nazi membership had to be affirmatively maintained thereafter." There is nothing in the evidence to prove that the scheme, if there was any, did not end in December 1940 when the last registration statement was filed as appears not only in the indictment but also in the proof. In each one of the statements of defendants offered in evidence not only the three that appeal, but also the others (All made in 1943 or 1944) they said nothing that would be evidential that they (in 1943 and 194 were continuing to carry on an alleged conspiracy that began in 1939 as alleged in the indictment. The majority opinion in the Circuit Court of Appeals makes this statement (Record, p. 363):

> "It is the nature of the agreement rather than the acts of the parties that determines if the conspiracy is a continuing one. The instant indictment charges a continuing agreement between the conspirators from prior to 1940 down to the date of the indictment. That was the foundation of the indictment and of the Government's evidence. It was on that theory that the statements by and conversations with the defendants was allowed."

We urge that the Circuit Court of Appeals in the majority opinion is confusing charges with proof and that there is no proof that (assuming a conspiracy to have been proven) any of the defendants on trial did any overt act to carry on such conspiracy as charged after the filing of the last registration statement in December, 1940.

The Circuit Court of Appeals in the majority opinion makes a point of confessions in this language (Record, p. 363):

> "It is not difficult to accept the so-called confessions as part of the acts which furthered the conspiracy when it is remembered that as to Mayer and Fiswick, their confessions coupled with the immediately preceding denials and as to Rudolph, his trial repudiation of his confession all give some indication at least that there has been a continuing affirmative fraud on the United States.
>
> If we are correct that the conversations with and the statements by the defendants, including Rudolph's testimony, are evidence of the continued functioning of the plan of not disclosing information and of giving false information, then there is no difficulty with respect to the statute of limitations. The jury by its verdict obviously believed as they were entitled to that they were dealing with a crime which continued right into the trial itself and therefore cases such as United States *v.* Irvine, 98 U. S. 450, 25 L. Ed. 193 and Meyer *v.* United States, 9 Cir. 220 F. 800 do not apply. Compare United States *v.* Alfano, 3 Cir., 152 F. 2d 395."

The statements made by defendants were not confessions of guilt. They were simply to the effect that whatever they had said on their respective registration statements

were true and by their latter statements they were attempting to explain that what they had said in the first instance was true although they may have not sufficiently understood such definitions as "affiliated with or active in (a member of, official of, or working for) organizations devoted in whole or in part to influence or furthering the political activities, public relations or public policy of a foreign government." None of the three who appeal were ever members of the so-called Nazi Party. The extent of their activities was application for membership (Record, pp. 272-282). Nothing in their statements to the F. B. I. was false information nor was the statement in the majority opinion of the Circuit Court of Appeals supported by any evidence that these statements were proof of "a continuing functioning of the plan of not disclosing information and of giving false information."

The dissenting opinion sums up in these words (Record, p. 365):

> "These confessions were each permitted to go in, over appropriate objection, as evidence against all of the Appellants, notwithstanding the fact that the statements could in no wise have been in furtherance of a conspiracy in that they were each made to the F. B. I. in full revelation, termination, and frustration of a conspiracy whose chief object had been the concealment of the same facts as revealed by the confessions."

This statement we urge is fully supported by the facts proven at the trial and that it was error to admit such statements either as proof of the conspiracy charged in the indictment or the continuance thereof.

POINT III.

There was no proof of intentional falsification in the registration statements filed by defendants.

(Assignments of Error 2 3, 4 and 11.)

Before aliens registered under the Alien Registration Act of 1940 they were furnished with instructions for registration and a specimen form of the Registration Statement (Exhibit D-2) which is not printed in this record. The instructions with respect to item 10, "Activities" are explained in these words:

> "State your activities during the past 5 years, either in the United States or abroad, other than as shown by your statements regarding present or usual occupation * * *."

Instructions under item 15 are entitled "*Activities for foreign government*". The prospective registrant is told to "write 'have' or 'have not' according to the fact." He is then told "If you write 'have,' state *position held*, length of time, nature of duties or activities, compensation received, and names of any *such* clubs, organizations, or societies." He is then told, if he has been employed by any foreign government he is to set forth the nature of the employment under this same item.

Turning to item 15 in the Registration Statement itself, G-1-F (Record, p. 266) the words are these:

> "Within the past 5 years I (have or have not) been *affiliated* with or *active in* (a member of, official

of, a worker for) organizations, devoted in whole or in part to influencing or furthering the political activities, public relations, or public policy of a foreign government."

In the instructions concerning item 15 nothing is said about "affiliation" and one would naturally assume that unless one held some position in such organization and therefore active in the organization, that the proper statement would be "I have not". Certainly this would be so understood by one who had only applied for membership in an organization. In item 15 itself, nothing is required to be declared concerning application for membership in any organization unless the word "affiliated" would put one who had applied for membership in the category of being affiliated with an organization. Affiliated, to be sure, is a broad term and its meaning in the registration statement is not defined in the instructions as to how to fill out item 15. It should be borne in mind that all of the defendants were humble folk, some of them spoke English well, others did not. We submit that even a person educated in this country might have difficulty in understanding just what was meant by being "affiliated" after reading the instructions on item 15 concerning "Activities for foreign government." Looking at the ordinary English dictionary we find that to affiliate with is "to receive on friendly terms; associate; to be intimate; sympathize; consort".

From our reading, the word "affiliation" seems to be susceptible of various meanings depending upon the subject matter to which it is applied. For example, another statute respecting Aliens and Nationality, in its provisions, sets up classes that shall be excluded from admission into

the United States and excludes "aliens who believe in, advise, advocate, or teach, or who are members of or affiliated with any organization, association, society or group, that believes in, advises, advocates, or teaches: (1) the overthrow by force or violence the Government of the United States * * *". This provision is to be found in Title 8 U. S. C. Section 137 (c). The same section in paragraph (f) defines "affiliation" as follows:

> "For the purpose of this section: * * *; (2) the giving, loaning, or promising of money or anything of value to any organization, association, society, or group of the character above described shall constitute affiliation therewith; but nothing in this paragraph shall be taken as an exclusive definition of * * * affiliation."

As we have already stated, "affiliation" is not defined in the instructions to registrants under the 1940 Act and they have to determine for themselves what it means.

In the *Bridges* case recently decided by this Court, (326 U. S. 135, 84 L. Ed. 2, 103), the Court had occasion to define what "affiliation" meant under the Act above quoted. The Court first gives the construction placed upon the Act in the case of *United States* v. *Reimer*, 79 Fed. (2d) 315 at 317, where Judge Chase, in the Second Circuit, said in part:

> "In deciding this case, we shall not attempt to give a comprehensive definition of the word 'affiliation' as used in the statute. Very likely that is as impossible as it is now unnecessary."

The Court in the *Bridges* case takes up several paragraphs in defining the meaning of the word and says in part:

> "Whether intermittent or repeated, the act or acts tending to prove 'affiliation' must be of that quality which indicates an adherence to or a furtherance of the purposes or objects of the proscribed organization as distinguished from mere cooperation with it in lawful activities. The act or acts must evidence a working alliance to bring the program to fruition"

The Court quotes from Judge Sears who wrote the opinion in the deportation proceedings of Bridges, and he also attempted to define "affiliation." The Supreme Court quotes his words as follows:

> "Affiliation may doubtless be shown circumstantially. Assistance in the enterprises of an organization, seeking members for it, taking part in meetings organized and directed by or on behalf of the organization, would all tend to show affiliation."

And so we say that in view of the instructions concerning "Activities for Foreign Government" under item 15, which say nothing about affiliation, and then finding the words "affiliated with" in item 15 itself followed by the words in parenthesis "(a member of, official of, and a worker for)", how can it be said that these defendants who had only *applied* for membership in the Nazi Party, who had taken part in no actual activities and who had not been accepted as members when they filled in the words "have not", did so with an evil purpose in mind to deceive the Government of the United States, or did so as part of a joint undertaking between them and other registrants and in a criminal conspiracy to deprive the Government of the United States of information which it should have.

Furthermore, there is no proof of anything sinister in the minds of the defendants when they went to the office of the German Consul seeking information as to the proper way to fill out their respective Registration Statements. It was a new law and no matter how long they had been in this country they were still German nationals and nothing of this nature had been required by the Government of the United States since the last World War. They were in a way, strangers in a strange land. It was therefore perfectly natural that they should seek information from the Consulate, not to learn some clever way of hiding something but to learn what the involved phraseology meant and just what should be included and in what language, or what language or words should be used to truthfully apprize the Government of the United States of their respective associations and activities. There was no proof of any conversation between the people at the Consulate and any of the defendants other than what is contained in the written statements, of the defendants, and from a reading of those statements it is perfectly obvious that if anyone in the Consulate had any sinister motives, they fell upon deaf ears so far as any of the defendants is concerned.

POINT IV.

The Trial Court erred in charging the jury on the admissibility and probative force of the written statements and verbal admissions of the defendants and the Circuit Court of Appeals erred in upholding this charge.

(Assignment of Error 5.)

After charging the jury with respect to the usual matters such as "presumption of innocence" and "reasonable

doubt", the Trial Court stated the following (Record, p. 239):

> "There have been admitted into evidence certain statements, written statements *and verbal admissions made by conspirators, of activities done in furtherance of the object of the conspiracy;* and these admissions and statements are admissible against all of the co-conspirators if made during the continuance of the conspiracy and during their participation in it. I have ruled that this is a continuing conspiracy, and with the exception of one defendant, to whom I shall advert later, I have ruled that all of the admissions and all of the statements are properly evidential against all of the defendants; and these admissions and statements were not allowed for the purpose of proving the conspiracy itself, but simply to prove acts and course of conduct on the part of the individual making the statement which would be chargeable to the other co-conspirators, because done, or if done, done in furtherance of the object of the conspiracy."

The foregoing, it will be observed, is an instruction to the jury as to what effect the statements or admissions of the defendants may have upon the minds of the jury in its deliberations and in determining whether or not there was a conspiracy, whether or not it was a continuing one and whether or not any of the defendants had any part in it.

While the Circuit Court of Appeals in the majority opinion makes the statement that no exception was taken to this part of the charge to the jury by the trial court (Record, p. 360) the Court quotes from the exception which was taken and we urge that it was sufficient.

The language of the charge as herein quoted makes the bold statement to the jury of "verbal admissions made by conspirators, of activities done in furtherance of the object of the conspiracy; and these admissions and statements are admissible against all of the co-conspirators if made during the continuance of the conspiracy and during their participation in it." That and all the rest of what the Court said about the statements admitted in evidence was fully covered we urge, by our exception.

Yet, the Circuit Court of Appeals in the majority opinion, in sustaining this charge, seems to be of the opinion that it was adequately explained by the trial court after the jury had returned for further instructions. We urge that the jury did not understand the original charge and that the additional instructions to the jury not only did not clarify but fell into the original error of admitting the statements of all the defendants on trial as binding on each one. This certainly is contrary to all of the decisions of this Court and of the Circuit Courts of Appeal in all circuits.

The minority opinion of Judge Waller fully demonstrates and supports our contention and we quote from that opinion as follows (Record, p. 368):

> "The foregoing charge to the jury had these serious vices:
>
> (a) It advised the jury that the verbal admissions *were made by conspirators.*
>
> (b) It advised the jury that the activities of the makers of the admissions *were done in furtherance of the objects of the conspiracy.*

(c) It advised the jury *that there was a conspiracy.* Otherwise nothing could have been done in furtherance thereof.

(d) It advised the jury that *the Court had ruled* that *it was a continuing conspiracy,* with the exception of one Defendant.

(e) It advised the jury that the admissions of any Defendant was evidence against all others.

(f) It advised the jury that the statements were admitted to prove acts and course of conduct on the part of the individual making the statement which would be chargeable to *the other co-conspirators.*

(g) It advised the jury that the conspiracy continued to the date of the indictment.

A judge cannot say to the jury that a defendant is a 'conspirator' or a 'co-conspirator' without telling the jury that 'there was a conspiracy'. The judge cannot tell the jury that this is a 'continuing conspiracy' without telling the jury that 'this is a conspiracy'. The judge cannot tell the jury that 'activities were done by conspirators in furtherance of the object of a conspiracy' without telling the jury that 'there was a conspiracy'.

Moreover, as we have demonstrated heretofore there is not the slightest evidence in this case, other than the silence of the Appellants prior to their confessions to the F. B. I. of the continuance of the conspiracy. Neither a conspiracy nor its continuance can be proven by the mere failure of a defendant to make a report to the officers.

This charge to the jury was the equivalent of a peremptory instruction to convict the Defendants."

"A statement made by a member of an existing conspiracy, out of the presence of another conspirator, cannot be used against the other conspirator, unless such statement is made in furtherance of the

objects of the conspiracy, or in and about the business of the criminal partnership. I reiterate, a statement made in giving the facts to the F. B. I. cannot possibly be held to be in furtherance of a conspiracy which conspiracy has for its chief object the suppression of those same facts.

Nevertheless, the lower Court advised the jury: 'There have been admitted into evidence * * * written statements and verbal admissions made by conspirators, of activities done in furtherance of the object of the conspiracy' and that they were, therefore, admissible against all Defendants if made during the continuance of the conspiracy and during their participation in it. He then peremptorily told the jury: 'I have ruled that this is a continuing conspiracy', thus telling the jury that there had been a conspiracy and that the statements by the Appellants were made during its continuance.

The Court below, in declaring that the conspiracy had continued until the bringing of the indictment, evidently overlooked the fact that such a holding required it to assume the prior existence of the alleged conspiracy.

The following statements seem so axiomatic as not to require citation of authorities in support:

(1) The existence, *vel non*, of a conspiracy is for a jury.

(2) Whether a conspiracy has continued is a question for the jury.

(3) Whether any act committed by a defendant was in furtherance of the object of the conspiracy is for the jury.

(4) No act of an alleged conspirator may be shown except one that the jury would have the right to conclude was in furtherance of the conspiracy.

(5) No statement made by one alleged conspirator is admissible against one who was not present when the statement was made unless there was evidence tending to show that the absentee was a member of the conspiracy and that the statement was made in furtherance thereof.

(6) No statement made by a conspirator after the termination of a conspiracy is admissible against anyone but the maker.

(7) Proof only of several separate conspiracies between individual Defendants and the German Consul would be insufficient to establish the existence of a general conspiracy under an indictment which alleged that each Defendant conspired 'with each other'.

(8) The mere continuation of the results of a crime does not continue the crime. *U. S.* v. *Irvine*, 98 U. S. 450; *U. S.* v. *Meyer*, 220 F. 800.

(9) To hold that a conspiracy was a continuing one because a result was continued without showing any overt acts since the hatching of the conspiracy would nullify the statute of limitations and permit a prosecution years after the statute had run, merely because the results might go marching on."

The majority opinion makes quite a point of the comprehension of the jury of the issues involved. We respectfully disagree. We feel and urge that the jury was so confused by the charge of the trial judge that they did not fully comprehend the issues to be decided by them and that under proper instructions even though the issues were left to the jury, the result would have been an acquittal.

POINT V.

The Trial Court erred in refusing to charge the jury as requested by the defendants and the Circuit Court of Appeals erred in upholding the Trial Court in this respect.

(Assignment of Error 6.)

The Court refused to charge the jury as requested by the defendants in the following respects:

> "11. If you find that the defendant Fiswick did not disclose in his registration statement that he was a member of the Nazi party in the United States because he did not believe or understand that he was a member and that he had only applied for membership in the expectation of returning to Germany, even though he continued to pay dues and that he honestly believed that he should say 'I have not' in completing No. 15 in his registration statement, then your verdict as to that defendant must be not guilty."

> "15. Before you can find a defendant guilty as charged in this indictment you must find (1) that he conferred with Draeger or Vogel or with someone in the office of the German Consulate with respect to registration under the act of 1940; (2) that in preparing his statement he intentionally followed the advice or instructions received at the Consulate to make a false statement concerning his membership or non-membership in the Nazi party and did not do so as his own and independent action or from motives of his own not the result of the advice or instructions received."

"16. If you find from the evidence that a defendant filed a false registration statement that in itself is not enough. You must also find that it was so filed as the result of an agreement on his part with another or others named in the indictment so to do."

"17. If you find that a defendant merely filed a false or inaccurate registration statement without consulting with or taking advice or instructions from named defendants or named co-conspirators such as Draeger or Vogel or other employees in the German Consulate, then your verdict as to that defendant must be not guilty."

"18. There is no issue in this case as to whether or not the representatives in the United States of the Nazi party were engaged in activities to promote the interests and ideology of the party in this country. The issue is whether or not the defendant here on trial conspired with other defendants or co-conspirators named in the indictment to file false alien registration statements required by the act of Congress of 1940 with respect to their individual activities, or their affiliation with or activities in (as a member, official of or worker for) the Nazi party either here or elsewhere. It is important that you keep the issue clear in your minds during your deliberation. For you to find that a particular defendant merely filed a false or misleading registration statement is not sufficient to convict him of the charge. You must find that he not only deliberately filed such false or misleading registration statement with intent to deceive but that he did so as the result of an agreement entered into by him with one or more of the defendants or co-conspirators named in the indictment so to do."

We feel that these requests were proper instructions and the subject matter thereof was not sufficiently covered in the charge of the Court. If our view of the law is correct, as heretofore argued, it was prejudicial error not to charge the jury as requested and the Circuit Court of Appeals erred in overruling this contention.

Truly the issues in this case were as to whether or not the defendants on trial had conspired with each other or anyone else named in the indictment. The mere filing of a false registration statement is not proof of a conspiracy and unless the jury could find that there was a concert of agreement and action on the part of the ones named in the indictment there could be no conspiracy. Failure of the trial Judge to so charge the jury was reversible error and the Circuit Court of Appeals should not have sustained this refusal.

Conclusion.

For the reasons advanced we urge that the judgment of conviction against the defendants-appellants should be set aside.

FREDERIC M. P. PEARSE,
Attorney for and of Counsel with Appellants.

Form AR-1

Excerpt from Defendants' Exhibit 2.

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
ALIEN REGISTRATION DIVISION
WASHINGTON, D. C.

THE NATIONAL REGISTRATION OF ALIENS
INSTRUCTIONS FOR REGISTRATION AND SPECIMEN FORM

Page 2

INSTRUCTIONS FOR SPECIMEN FORM

* * * * * * *

Item 10. ACTIVITIES.—State your activities during the past 5 years, either in the United States or abroad, other than as shown by your statements regarding present or usual occupation. Give the approximate dates of such activities.

* * * * * * *

Item 15. ACTIVITIES FOR FOREIGN GOVERNMENT.—Write "have" or "have not" according to the fact. If you write "have," state position held, length of time, nature of duties or activities, compensation received, and names of any such clubs, organizations, or societies. If you have been employed by any foreign government or subdivision thereof, the nature of the employment and the approximate dates should be stated.